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EXAMINER

HALE, GLORIA M

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RONALD J. BOSER

Appeal 2009-013715
Application 09/944,612
Technology Center 3700

Before LINDA E. HORNER, JENNIFER D. BAHR, and JOHN C.
KERINS, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Ronald J. Boser (Appellant) appeals under 35 U.S.C. § 134 (2002) from the Examiner's decision rejecting claim 1, which is the only claim pending in this application, under 35 U.S.C. § 112, second paragraph, as being indefinite; under 35 U.S.C. § 103(a) as being unpatentable over Fairbanks (US 2,613,365, iss. Oct. 14, 1952), Gershman (Maurice Gershman, MD, *SELF-ADHERING NYLON TAPES*, 168 J.A.M.A., 930 (Oct. 18, 1958)) and Shimizu (JP 8-158111, pub. Jun. 18, 1996)²; and under 35 U.S.C. § 102(b) as being anticipated by Shimizu. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

The Invention

Appellant's claimed invention is directed to a brassiere. Claim 1, reproduced, below, is the only claim pending in the application.

1. A first and second construction for right and left breast cup supports for a brassiere attached in supporting relation respectively in surrounding relation about a bottom of a cooperating breast cup using VELCRO hook-type and VELCRO loop-type fasteners, said first and second construction comprising for each breast cup a U-shape of shape-imparting construction material serving as each said cup support, a fabric casing in covering relation about said U-shape, a VELCRO hook-type fastener in a strip configuration attached to said fabric casing, and a VELCRO loop-type fastener in a strip configuration attached in an outwardly facing relation in an operative location in surrounding relation about a bottom of a cooperating breast cup and in an interposed position between said brassiere and an upper torso of a wearer of said brassiere, said strips of VELCRO hook-type and VELCRO loop-type

² We refer in this opinion to the English language translation of this document prepared by FLS, Inc. in Feb. 2005, contained in the image file wrapper for this application.

fasteners having operative positions in face-to-face contact with each other incident to providing breast cup support to said wearer of said brassiere, and only in said second construction a removal of said attached cup support which exposes said VELCRO loop-type attached strip which is characterized by a nominally felt presence to the touch of said second construction contributing to comfort in the wearing of the brassiere.

SUMMARY OF DECISION

We AFFIRM.

OPINION

Rejection (1) – indefiniteness

The Examiner rejected claim 1 as indefinite because, according to the Examiner, the trademark “VELCRO” is used therein to describe hook-type and loop-type fasteners. Ans. 3. The Examiner reasons that a trademark is used to identify a source of goods, and not the goods themselves. *Id.* Consequently, according to the Examiner, the use of the trademark to describe hook-type and loop-type fasteners renders the claim indefinite. *Id.*

In contesting the rejection, Appellant does not dispute that “VELCRO” is a trademark. Rather, Appellant contends that because the trademark “VELCRO” appears in capital letters and is followed by a generic designation of the product, thereby respecting the proprietary nature of the trademark in the manner set forth in the *Manual of Patent Examining Procedure* (MPEP) § 608.01(v) (8th Ed., Rev. 8, Jul. 2010), its use is permissible. App. Br. 3-4; Reply Br. 1-2.

Accordingly, the issue raised in the appeal of this rejection is whether the use of the trademark “VELCRO” renders claim 1 indefinite.

The test for definiteness under 35 U.S.C. § 112, second paragraph, is whether “those skilled in the art would understand what is claimed when the claim is read in light of the specification.” *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986) (citations omitted).

The primary purpose of the definiteness requirement is to ensure that the claims are written in such a way that they give notice to the public of the extent of the legal protection afforded by the patent, so that interested members of the public, *e.g.*, competitors of the patent owner, can determine whether or not they infringe.

All Dental Prodx, LLC v. Advantage Dental Prods., Inc., 309 F.3d 774, 779-80 (Fed. Cir. 2002) (*citing Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 28-29 (1997)).

Appellant’s reliance on the guidance in MPEP § 608.01(v) is unavailing here, as that section does not address the use of trademarks in claims. The use of trademarks in a claim is addressed in MPEP § 2173.05(u), which instructs examiners that the use of a trademark in a claim to describe a product renders the claim indefinite.

The Examiner is correct that the trademark “VELCRO” identifies the source of the product, and does not describe the product itself. *See* 15 U.S.C. § 1127 (defining the term “trademark” as “any word, name, symbol, or device, or any combination thereof” used to identify and distinguish the trademark owner’s product from those manufactured or sold by others and to indicate the source of the goods). The trademark “VELCRO” precedes “hook-type fastener” and “loop-type fastener” in the claim so as to modify those terms. It is not clear how the trademark “VELCRO” describes or further modifies “hook-type fastener” and “loop-type fastener,” because a

trademark identifies the source of a product, not structural details of the product. The manufacturer of a product sold under a trademark may modify or update the structure of that product from time to time, or manufacture or sell different versions of the product, such that any product details associated with the trademark are uncertain and arbitrary. Consequently, if any effect is to be given to the trademark “VELCRO” in claim 1, in accordance with precedent of our reviewing court,³ potential competitors would be unable to ascertain whether or not they are infringing the claimed subject matter. Therefore, we agree with the Examiner that the use of the trademark “VELCRO” in claim 1 renders the claim indefinite.

We sustain the rejection of claim 1 under 35 U.S.C. § 112, second paragraph.

Rejection (2) - Fairbanks, Gershman, and Shimizu

We adopt all of the findings and reasoning of the Examiner on pages 4-6 of the Answer.

In essence, the Examiner found, and we agree, that Fairbanks describes a brassiere comprising all of the features of claim 1 with the exception of hook-type and loop-type fasteners to detachably secure the sheath 25 and wire frame 30 to the first and second breast cups (bust pockets 12, 13). Ans. 4-5. Rather, Fairbanks discloses as the securement means a tape 20 comprising female snap fastening members 21 on the cups and a

³ Claims are interpreted with an eye toward giving effect to all terms in the claim. *See, e.g., Elekta Instr. S.A. v. O.U.R. Scientific Int'l, Inc.*, 214 F.3d 1302, 1305, 1307 (Fed. Cir. 2000); *Stumbo v. Eastman Outdoors, Inc.*, 508 F.3d 1358, 1362 (Fed. Cir. 2007) (denouncing claim constructions which render phrases in claims superfluous).

plurality of male snap fastening members 26 on the sheath 25 spaced so as to engage with the female snap fastening members. Col. 3, ll. 29-31 and 37-40.

Gershman discloses the use of “synthetic burs” comprising one tape strip having a top bristle or male surface composed of tiny hooks and a cooperating second tape having a bottom matted or female surface composed of tiny loops as an attachment means for securing items, such as a brassiere, on a person. Gershman teaches placing the tape with the male (hook) surface on the outer (top) face of the bottom layer of material and the tape with the female (loop) surface on the layer overlying the bottom layer so as to engage the hooks and loops. Gershman also specifically teaches the use of such hook and loop fasteners to replace snaps.

Shimizu teaches the use of such hook and loop (soft pile) fasteners in brassieres, for detachably securing cup members to cup-use concave portions and pads to cup members, and further teaches placing the loop (soft pile) fastener members on the surfaces that may make direct contact with the skin of the user, so as to provide a pleasant feel. Paras. 11, 19, 22, 29.

Gershman and Shimizu provide more than ample suggestion to support the conclusion that it would have been obvious for a person of ordinary skill in the art to modify the Fairbanks brassiere by replacing the tapes of female and male snap fasteners of Fairbanks with soft pile (female, loop) fastener members and hook (male) fastener members, respectively, such that the loop-type fastener members replace the tapes 20 on the inside surface of the bust pockets 12 and 13, so as to provide a comfortable feel against the skin of the wearer in the wireless version of the brassiere, when the sheath 25 and wire frame 30 are not attached (*see* Fairbanks, col. 2, ll. 1-10).

For the above reasons, the Examiner correctly concluded that the combined teachings of Fairbanks, Gershman, and Shimizu render obvious the subject matter of claim 1.

Appellant does not assert any arguments against the combined teachings of Fairbanks, Gershman, and Shimizu. Rather, Appellant asserts arguments as to why neither Gershman nor Shimizu anticipates the claimed subject matter. App. Br. 6, 7. Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See In re Merck & Co. Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Appellant's only reference to Gershman is a bald assertion that the Gershman article cannot be relied upon to support the point that hook and loop fasteners were not available at the time of Fairbanks' invention. App. Br. 4. That point is not pertinent to the question of whether the combined teachings of Fairbanks, Gershman, and Shimizu render obvious the subject matter of claim 1 to a person having ordinary skill in the art *at the time of Appellant's invention*.

Appellant has not persuaded us that the Examiner's rejection of claim 1 under 35 U.S.C. § 103(a) should be reversed. We sustain the rejection.

Rejection (3) – anticipation by Shimizu

Appellant argues that Shimizu does not anticipate the subject matter of claim 1, because Shimizu describes cups, not supports, which are detachable. App. Br. 7. Thus, the issue raised in the appeal of this rejection is whether Shimizu describes detachable breast cup supports comprising for each breast cup a U-shape of shape-imparting material, as called for in claim 1.

The Examiner correctly found that Shimizu describes U-shaped wire supports 4 on cups 2 (paras. 13, 28; fig. 4), which are detachably secured to cooperating breast cups (cup-use concave portions 1a of mounting means 1) by means of cup fastening sections 2b (each having hooks, disposed on the cups 2) and cup holding sections 1b (each comprising a tape of napped pile material having a large number of soft piles (loops), disposed on the cooperating breast cups) (para. 29). Ans. 7-8.

We thus conclude that the Examiner correctly found that Shimizu describes detachable breast cup supports comprising for each breast cup a U-shape of shape-imparting material, as called for in claim 1. We sustain the rejection of claim 1 under 35 U.S.C. § 102(b).

DECISION

The Examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

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